ATTACHMENT 2

Background Information

On March 22, 2010, the Office of Administrative Law (OAL) issued a Decision of Disapproval of Regulatory Action (Decision) for the Regulation to Reduce Greenhouse Gas Emissions from Vehicles Operating with Under Inflated Vehicle Tires (regulation). The Decision can be found at http://www.arb.ca.gov/regact/2009/tirepres09/tirepresdd.pdf.

In the Decision, OAL found that ARB had provided an incomplete response to one of the comments[1] submitted during the 45-day public comment period. The comment relates to subsection (g) of the proposed regulation, which contains a severability clause that if any portion of the regulation is held invalid by a court of competent jurisdiction, such holding will not affect the validity of the remaining portions of the regulation. The commenter asserts that such severability clauses are inappropriate in regulations subject to Administrative Procedure Act (APA; Government Code section 11340 et seq.), and advances several reasons why this is so.

First, the commenter contends that severability clauses are inappropriate in regulatory proposals subject to the APA, because regulatory proposals must be analyzed in their entirety, and severing one provision of a regulation may alter the appropriateness of the regulatory proposal as a whole. The commenter also argues that severability clauses impermissibly expand the scope of authority granted by the Legislature, in violation of the APA's authority requirement. The commenter further states that because Health and Safety Code (HSC) section 39601 requires that any regulation implementing AB 32 must comply with the provisions of the APA, severability clauses also conflict with the implementing statute, thereby violating the APA's consistency requirement as well. The commenter believes that if a court declares a provision of the regulation to be invalid, ARB must follow the normal APA process and introduce a replacement regulation, which should stand or fall on its own merits.

In addition to OAL's finding that ARB provided an inadequate response to this comment, OAL also found that ARB did not comply with the "necessity" standard of the APA because the Staff Report: Initial Statement of Reasons[2] did not contain an explanation of the need for the severability clause.

---

[1] See Comment No. 2-3 [Morrison, CNCDA] in Section II of the Final Statement of Reasons for this regulatory action: http://www.arb.ca.gov/regact/2009/tirepres09/tirepres09.htm

[2] ARB, 2009. California Air Resources Board. Staff Report: Initial Statement of Reasons for Proposed Rulemaking, Proposed Regulation for Under Inflated Vehicle Tires, February 2009.

Staff Response

Both of the issues raised by OAL concern the severability clause in subsection (g) of the proposed regulation. Since these two issues are closely related, ARB offers the following explanation to both respond to the public comment and explain why the severability clause is necessary.

Most ARB regulations approved by OAL contain severability clauses. Severability clauses have become so commonplace that Professor Singer, in his editing of Statutes and Statutory Construction described severability clauses as "…little more than a mere formality."[3] As recognized by the United States Supreme Court and the highest state court in virtually every state, severability clauses provide an interpretive tool expressing the intent of the rulemaking body that in the event a statute (or in this case a regulation) is determined to be partially invalid, the remainder of statute should be given effect (see, for example *Danskin v. San Diego Unified School Dist*. (1946) 28 Cal.2d 536 and *Bacon Services Corp. v. Huss* (1926) 199 Cal. 21).

In adopting the Mulford–Carrell Air Resources Act over a quarter of a century ago, the Legislature noted that the degradation of California's air quality was becoming an increasingly harmful problem, detrimental to health, safety and welfare of the people of California (HSC §39000). That concern is just as true today. In fulfilling its mission of promoting and protecting the public health, welfare and ecological resources through the effective and efficient reduction of air pollutants while recognizing and considering the effects on the economy of the state, ARB is often called upon to defend in court its efforts to assure all Californians have safe, clean air to breathe. The inclusion of severability clauses in ARB regulations helps ensure that the maximum air quality benefits from each regulatory action are preserved for California by minimizing the impacts of an adverse judicial determination. In short, a severability clause is necessary to ensure that public health and safety benefits are achieved by the regulation to the greatest extent possible.

The commenter seems to take the position that, despite being recognized by the numerous courts as a means for legislative bodies to convey their intent, the inclusion of a severability clause results in the bypassing of legal requirements and/or increases an agency's authority. The commenter is arguing that severability clauses can never be included in regulations adopted under the APA, because including a severability clause allegedly does not comply with APA requirements. It is worth noting that severability clauses are contained in a large number of regulations that have been adopted by many State agencies and approved by OAL. If the commenter is correct in his novel legal argument, all of these regulatory provisions are illegal under California law.

[3] See generally, 2 Sutherland Statutory Construction, 6th Ed. §44.8

As mentioned above, a severability clause is nothing more than an expression of intent by the body that has adopted a law or regulation. As discussed by the courts in the cases noted above, a severability clause is not binding on the courts.[4] If a court determines that the offending portion of the regulation cannot be severed without doing fatal damage to the regulation as a whole, then the court will strike down the entire regulation regardless of the presence of a severability clause. Even without a severability clause, courts have demonstrated a practice of severability when it is appropriate to do so. The commenter appears to assume that it is the severability clause that provides a court with the authority to sever a portion of a regulation. This is not true; courts have the inherent power do so,[5] and can determine whether severing a portion of a challenged regulation is appropriate in the context of the particular case before the court.

The claim that a severability clause expands ARB's authority under the HSC is also incorrect. The commenter's argument is based on HSC section 39601, which basically requires ARB to adopt regulations in accordance with the APA. This is exactly what ARB does when it adopts a regulation that includes a severability clause. The commenter's argument confuses ARB's authority under the HSC to adopt regulations with the procedural requirements of the APA that must be followed when a regulation is adopted. ARB's authority to adopt a regulation is separate and distinct from the procedural steps that ARB must follow when it adopts a regulation.

In summary, the commenter provides no legal precedent supporting his opinions, and they represent a radical departure from current law and the long established practices of California government agencies. Severability clauses simply provide evidence of intent, and have been recognized by both the United States and California Supreme Courts as a viable means of expressing the intent of the adopting authority. Severability clauses have no bearing on the authority of ARB to adopt regulations and do not violate APA requirements. Finally, as discussed above, ARB has good cause, or need, for the inclusion of severability clauses in its regulations.

---

[4] "Although such language cannot be read as an inexorable command it is well settled that "The use of such language may rightly be considered by the court as a declaration of intention on the part of the legislature that in so far as lay within its power a separable invalid portion of the act should not destroy the whole." Danskin v. San Diego Unified School District (1946) 28 Cal. 2d. 236 at 555 citing Bacon Service Corp. v. Huss (1926) 199 Cal. 21."

[5] See generally, 2 Sutherland Statutory Construction, 6th Ed. §44.8